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No. 90-957

In The

Supreme Court of the United States

October Term, 1990

GARIE NEGRON,

Petitioner,

vs.

BANCO DE PONCE,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was sufficient evidence presented that the Petitioner Garie Negron committed fraud in her telemarketing activities and that the proximate cause of the bank's losses was the racketeering activity of a RICO enterprise?

2. Was the decision made by the United States District Court for the Eastern District of New York and affirmed by the United States Court of Appeals for the Second Circuit to relieve the attorney for Garie Negron from representing her correct?

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No. 90-957

In The

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October Term, 1990

GARIE NEGRON,

Petitioner,

vs.

BANCO DE PONCE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS TO BE REVIEWED

18 U.S.C. 1961, 18 U.S.C. 1962, 18 U.S.C. 1964

STATEMENT OF THE CASE

On March 2, 1988 a motion was heard before the United States District Court, Eastern District of New York (Nickerson, J.) for an order of attachment against the assets of GARIE NEGRON ("NEGRON") also known as GARIE CARDONA.

That motion was granted by the court.

On October 26, 1989 a trial was had before the same court. At the trial a motion pursuant to Section 804 (b)(1) of the Federal Rules of Evidence was made and granted whereby the entire transcript from the hearing of March 2, 1988 with supporting exhibits and other documentation presented at the hearing was admitted into evidence as Plaintiff's Exhibit 1 (A120-A122).

On January 2, 1990 a judgment was entered in the Eastern District of New York in favor of BANCO DE PONCE ("BANCO") against NEGRON in the sum of $34,818.18, treble damages, and $20,357.44 for attorneys fees, for a total of $55,176.12 (SA1).

On January 4, 1990, a letter was written to Judge Nickerson whereby a motion was made by the attorneys for BANCO asking that Judge Nickerson recalculate the amount of damages in the cause of action for fraud (SA2-SA4). Copy of said letter was served upon Petitioner (SA5-SA6). Judge Nickerson considered said motion and subsequently executed an amended memorandum and order increasing BANCO's treble damages to $58,660.50, thus increasing the total award to $79,018.44 (SA7-SA12). An amended judgment was entered pursuant to the amended memorandum and order on July 17, 1990 (SA13).

The appeal made by NEGRON to the United States Court of Appeals for the Second Circuit was taken from the original judgment entered on January 2, 1990 and not from the final amended judgment entered on July 17, 1990. Although both judgments resolve the factual issues of this case identically, only the one entered on July 17, 1990 should have been considered as the final judgment on this case and the judgment from which the appeal should have been taken, moreso where the latter judgment makes a final determination of damages. Under these

circumstances, the appeal should have been dismissed as premature and deemed a nullity.

Notwithstanding the foregoing, the United States Court of Appeals for the Second Circuit decided to reach the merits of the original District Court judgment, as amended on account of an arithmetical recalculation, dated July 17, 1990. That judgment in the amount of $79,018.44 was affirmed for the reasons stated in Judge Nickerson's thorough opinion dated December 26, 1989. An order was entered by the United States Court of Appeals for the Second Circuit on October 5, 1990.

Throughout this reply brief references are made to A and SA. A stands for the Appendix submitted by NEGRON to the United States Court of Appeals for the Second Circuit. SA stands for the Supplemental Appendix submitted by BANCO. It was necessary for BANCO to submit a Supplemental Appendix because NEGRON purposely omitted important documents, including trial exhibits, from her Appendix. In her petition for a writ of certiorari NEGRON has again misstated and omitted important facts in this case. The following are the true facts of this case.

In January 1987, the Petitioner NEGRON opened a checking account for her travel agency known as A BEST RATE TRAVEL ("BEST RATE") at BANCO's branch located at 15 Graham Avenue, Brooklyn, New York (A52-A53 and SA14). At the same time NEGRON and BANCO entered into an agreement, whereby BEST RATE would sell travel tickets, tours and other travel services through Master Charge or Visa credit cards (A34). The charge slips prepared for each sale made would then be deposited to the BEST RATE account at BANCO and be immediately credited as cash (A98-A99 and A124-A128).

For the first couple of months the BEST RATE account was inactive (SA14-SA19) but on June, 1987 BANCO began to notice

an unusual activity in the account. For the month ending May 30, 1987 there were deposits totalling $33,711 and an ending balance of $19,035.41. For the month ending June 30, 1987 there were deposits totalling $149,454.00 and an ending balance of $48,994.72. For the month ending July 31, 1987 there were deposits totalling $168,809.24 and an ending balance of $26,002.25. For the month ending August 31, 1987 there were zero deposits and an ending balance of $3,497.10. For the month ending September 30, 1987 there were zero deposits and an ending balance of *negative* $11,645.90 (A53-A55 and SA18-SA39). On July 29, 1987 NEGRON was notified by telephone that the BEST RATE merchant facility service had been closed (A6). Although the merchant service account was closed, the regular business checking account remained open until January 31, 1989 (A104, A152 and SA57).

The negative balance in the BEST RATE account was caused by an unusual number of chargebacks (charges to credit cards which were rejected by dissatisfied customers) that were being debited to the account (A55). Despite the substantial sales made by this organization there were insufficient funds to cover all of these charges. When the chargebacks began to appear in great numbers in June, 1987 there was enough money in the account to cover the debits that were being created (SA20-SA27). By the end of August though, all of the monies that had been deposited in the BEST RATE account from May through July had already been withdrawn or transferred out. Once there was no money left in the account, every chargeback received increased the negative balance (SA38-SA57).

The amount of chargebacks that were covered by monies which were in the account from May through early August approximated $22,300 (SA18-SA37). From the time that chargebacks could no longer be covered by monies in the account until the time the business checking account was closed on January

31, 1989 the bank incurred chargebacks in the sum of $49,553.50. This amount is evidenced by adding the closing balance on January 31, 1988 of *negative* $41,606.06 (SA57) to a credit that was made to the account in March, 1988 in the sum of $7,947.44 (SA47). When the $7,947.44 was credited to the account, the negative balance was reduced. That is why the credited amount was added back to the final negative balance of the account to come up with the total of chargebacks during the period when there was no money in the account to cover the debits created by said chargebacks (A151-A153 and SA2-SA4).

This cause of action was originally brought against NEGRON, an IRWIN SHAPIRO, a JOSEPH MAIURO, a company by the name of DELCO TOURS, INC., and another company known as AAA HOLIDAYS INTERNATIONAL OF SOUTH FLORIDA, INC., all these defendants known as doing business under the assumed name S/E PLAYERS (A16-A28). Since BANCO settled with the Florida defendants in this case for the amount of $30,000, the amount claimed as damages against NEGRON at trial was $19,553.50 (A151-A153 and SA2-SA4).

The withdrawal and destination of the monies in the BEST RATE account was clearly stated in ROBERT MAISONET's ("MAISONET") affidavit in support of the application for an order of attachment that was heard before Judge Nickerson on March 2, 1988 (A9-A11). MAISONET obtained this information from the debit slips and copies of cashed checks that were attached to BEST RATE account statements. These were admitted into evidence at the trial of October 26, 1989.

On May 27, 1987 a check for $14,573.10 was made by NEGRON to BANCO indicating a transfer. This check was apparently exchanged for cash since it carries the bank officer's initials thereon (SA18-SA19).

On June 2, 1987 a transfer of $16,854.39 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20-SA22).

On June 4, 1987 a transfer of $15,456.58 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20, SA21 and SA23).

On June 10, 1987 a transfer of $24,608.05 was made to the account of NEGRON at the Columbia Federal Savings Bank (SA20, SA21 and SA24).

On June 19, 1987 a transfer of $26,693.58 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20, SA21 and SA25).

On June 27, 1987, a transfer of $28,536.21 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20, SA21 and SA26).

On June 30, 1987 a check was made to NEGRON for $24,641.24, appearing to have either been cashed or deposited at Citibank, N.A., account No. 26105302 (SA27-SA29).

On July 13, 1987 a check was made to the order of NEGRON for $23,024.41 having the indorsement stamp of Columbia Federal Savings Bank on the back for deposit in NEGRON's account (SA28-SA30).

On July 15, 1987 a check was made to NEGRON for $8,361.28 appearing to have been deposited into her account at the Columbia Federal Savings Bank (SA28, SA29 and SA31).

On July 15, 1987, a check was made to the order of NEGRON for $7,000.00 which, by the indorsement stamp, appears to have

been deposited in NEGRON's account at Columbia Federal Savings Bank (SA28, SA29 and SA32).

On July 23, 1987 a check was made to NEGRON for $23,360.06 and was deposited at the Columbia Federal Savings Bank into NEGRON's account (SA28, SA29 and SA33).

On July 29, 1987 a check was made to the order of NEGRON for $41,469.00 and deposited into her personal account No.2215001213 (SA28, SA29 and SA34).

The last major withdrawal was made by a check dated August 4, 1987 made to cash for $13,518.00 which has a legend on the front in NEGRON's handwriting that the cash was being transferred to the Columbia Federal Savings Bank (SA35 and SA37).

The total withdrawals that NEGRON made from the BEST RATE account for her own benefit were $157,413.90. The total amount of the transfers made to the S/E Players account at the Family Bank of Hallandale, an account which was controlled by the Florida co-defendants, was $87,540.76.

Contact was made with NEGRON on several occasions and she admitted that she had been engaged in a telemarketing scheme, where customers were called and sold misrepresented travel services which caused the subsequent rejection of the credit card debits to the customers' accounts, thereby creating the chargebacks. On one occasion NEGRON indicated that BANCO could expect to receive back at least one third of all sales as chargebacks to the account (A55-A59, A63).

On all occasions in which NEGRON was contacted, she was requested to make some arrangements for repayment of the losses caused to BANCO. She indicated no desire to repay the losses

caused to BANCO, except that on September, 1987 she suggested to BANCO that it misrepresent to the other defendants that BANCO would again reopen the merchant facility service with BEST RATE. She assured BANCO representatives that if this falsity was stated by BANCO, she could obtain $100,000.00 from these defendants to be applied by BANCO to its losses (A60-A62).

At all times the defendant NEGRON denied that she had any assets or the ability to repay and denied that she owned any property on which security could be taken by BANCO to guarantee payment. She further withheld from BANCO information on two real estate properties in Queens under her other name of GARIE CARDONA (A59-A60).

ARGUMENT

I.

SUFFICIENT EVIDENCE WAS PRESENTED THAT THE PETITIONER COMMITTED FRAUD IN HER TELEMARKETING ACTIVITIES AND THAT THE PROXIMATE CAUSE OF THE BANK'S LOSSES WAS THE RACKETEERING ACTIVITY OF A RICO ENTERPRISE.

The Racketeer Influenced and Corrupt Organization Act ("RICO"), Section 1962(c) makes it unlawful for a person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity, 18 U.S.C. Section 1962(c). Simply read, for a defendant to be found guilty of 18 U.S.C. Section 1962 (c), a plaintiff must prove existence of both an "enterprise" and a "pattern of racketeering activity". Both of these requirements were met by the Respondent at trial before Judge Nickerson of the United States District Court

for the Eastern District of New York. The United States Court of Appeals for the Second Circuit thereafter affirmed Judge Nickerson's decision.

Under 18 U.S.C Section 1961(4) an "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. In the present case the "enterprise" as defined by the statute was found to be the association of NEGRON, through her travel agency BEST RATE, with the Florida co-defendants.

The existence of the travel agency BEST RATE has never been disputed by Petitioner. This agency was visited by BANCO's officials and proved to be in operation (A52-A53). Mr. Maisonet stated in his testimony that BEST RATE had a group of individuals working for it and these individuals had lists of persons who had either Mastercharge or Visa cards. The card holders would be called and travel packages were then sold to them over the phone (A57-A58). In her affidavit in opposition to the motion for an order of attachment in March, 1988, NEGRON acknowledges her association with the Florida co-defendants and sheds some light as to the way the enterprise operated (SA71-SA79).

The enterprise in this case had all the appearance of a legitimate association and, in fact, some of the business it conducted seems to have been legal. What made this enterprise fall within the purview of the RICO statute, however, was that numerous fraudulent acts were committed by its members through such enterprise. *H.J. Inc. v. Northwestern Bell Telephone Company,* 109 S. Ct. 2893 (1989). These fraudulent acts constituted a pattern of racketeering activity.

During recent years a number of cases have construed the requirement of a "pattern of racketeering activity" as defined

by RICO. This Court in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L.Ed. 2d 346 (1985) held that, to constitute a pattern, while two acts of racketeering activity are necessary, they may not be sufficient. The requirement that a minimum of two racketeering acts is needed was also held in *United States v. Indelicato,* 865 F.2d 1370 (2nd. Cir. 1989).

Expanding the analysis of the statutory term "pattern of racketeering activity" and citing the legislative history of RICO, this Court also held in *Sedima, supra,* that it is the factor of continuity plus relationship which combine with the necessary acts to produce a pattern. The United States Court of Appeals for the Second Circuit in *Beauford v. Helmsley,* 865 F. 2d 1386 (2d Cir. 1989) *vacated and remanded to Court of Appeals,* 109 S. Ct. 3236 *reasoning aff'd and remanded,* slip op. 87-7216 (2d. Cir. 9/15/89) also held that the requirements of relatedness and continuity were essential to the pattern element.

This Court most recently in *H.J. Inc., supra,* addressed again the concept of a "pattern of racketeering activity". It held that the section of the statute headed definitions, 18 U.S.C. Section 1961, does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern, said minimum being at least two acts of racketeering activity, but that instead the term pattern itself requires the showing of a relationship between the acts and a threat of continued activity. This Court stressed that it is this factor of continuity plus relationship which combines to produce a pattern.

If we apply the requirements discussed above to the facts presented at trial it is clear that NEGRON has violated RICO. The Petitioner stated in her brief that:

> "The only witnesses called were bank employees, who irresponsibly referred to the telemarketing of

> travel packages as fraudulent. The record does not refer to a single customer of the travel agency, claiming to be defrauded. The record fails to describe the terms and conditions of any travel package. The record fails to indicate that appellant ever improperly obtained the credit card numbers from customers. Indeed, it was brought out that Banco de Ponce referred this matter to the Queens County District Attorney. Since no prosecution ever resulted from the referral, it is obvious that the District Attorney found no criminality."

The main witness called by BANCO at the hearing for an order of attachment and at trial was FRED DOMINGUEZ ("DOMINGUEZ"). This Court should take note that Petitioner incorrectly refers to DOMINGUEZ as VALDES all throughout her brief. Testimony showed that DOMINGUEZ was assigned as immediate supervisor and was responsible for the Merchant Service Department at BANCO since the latter part of 1987 (A98). His knowledge of the Merchant Facility Service was surpassed by no one at BANCO. Contrary to what the Petitioner states in her brief the record does show sufficient evidence that a racketeering enterprise and racketeering acts existed.

Plaintiff-Respondent's Exhibit 2 at the attachment hearing and Plaintiff-Respondent's Exhibit 4 at trial is a sample letter from a BEST RATE customer that was called on the telephone and offered a trip to the Bahamas that he had "supposedly" won. He was told over the phone that the trip would cost him $88 for two people, but when he received the brochure from BEST RATE it stated that his wife's trip would cost an additional $119.00. He was also told that this trip could be taken anytime through 1988, but the brochure received from BEST RATE stated that the offer was only good until January 1, 1988. The brochure also stated that he had to give BEST RATE three different dates when

he could take this trip. This detail apparently was not discussed in the telephone call either. Each and every statement made to the customer was a misrepresentation (SA80-SA81).

This sample letter received by the Mastercharge and Visa Association (the "Association") was the typical letter received from hundreds of dissatisfied customers. The customer's credit card account had been charged with the price of the travel package sold by BEST RATE. After discovering the serious misrepresentations made by BEST RATE, the particular customer demanded from the Association that a credit be made to his account. Meanwhile, at the time of the sale, BEST RATE had written a charge slip which it deposited in its account at BANCO creating a cash credit to that account. BANCO presented such charge slip to the Association and the Association was supposed to pay BANCO its value. What happened in the numerous cases in which BEST RATE sold fraudulent packages was that the Association did not honor the charge slips received through BANCO because the Association's customers had refused to pay for such fraudulent travel packages.

The charge slips rejected by the Association created the chargebacks that BANCO had to debit from the BEST RATE account. As pointed out in respondent's statement of the case, when the chargebacks originated, there were sufficient funds in the BEST RATE account to cover for them. NEGRON knew, however, that the chargebacks would continue at an alarming rate and she rushed to withdraw all monies from the account, transferring the funds either to another account of hers at a different bank or to the account of the co-defendants in Florida (A130-A132).

It is incorrect for the Petitioner to state in her brief that the record does not show evidence of any racketeering acts or any of the elements of fraud. Testimony at the attachment hearing

showed that five hundred of these letters referring to BEST RATE were written to the Association and in turn sent to BANCO (A100-A103). Testimony at the trial more than a year later showed that the amount of letters had increased to over one thousand (A130-A132). DOMINGUEZ, as the supervisor of the Merchant Facility Service, constantly reviewed the letters written and testified that these letters included grievances such as quality of merchandise, service not performed, and unauthorized use of card numbers as typical reasons customers had for requesting a credit to their account from the Association.

Petitioner also contends that since no prosecution ever resulted from the referral of this case to the Queens County District Attorney that the District Attorney found no criminality. This is a completely baseless conclusion and does not require a response.

Petitioner repeatedly states in her brief that all of the bank's losses were self imposed. The reason given was that BANCO blindly elected to credit a customer, without inquiry into the customer's complaint, merely to maintain its goodwill. The Petitioner states "that what apparently occurred in the case at bar was that any customer requesting from the bank a credit, got it on demand." The Petitioner would have this Court believe that she does not understand the creation of a chargeback. As stated above, the letters that were written by the defrauded customers of BEST RATE were not sent directly to BANCO. These letters were sent to the Association so that the customers' credit card accounts could be credited accordingly by the Association (A130-A132). NEGRON knows very well that BANCO would not be reimbursed by the Association and could do nothing about it other than seek from her reimbursement for the slips not honored by the Association (SA34, Merchant Agreement, Clause 10). Under the appearance of perfectly valid sales she had BANCO credit the BEST RATE account so that she could almost immediately thereafter take the money out for

her benefit and that of the Florida co-defendants.

The facts presented above clearly meet the requirements of continuity plus relationship in *H.J Inc., supra.* There can be no question that the hundreds of mail and wire frauds committed in violation of 18 U.S.C. Section 1341 and Section 1343, have the necessary interrelationship to be considered a pattern. All of the telephone calls and mailings were made to persons related by their potential interest in purchasing the travel packages offered. All of the frauds had the same goal of inflating the profits of BEST RATE through the sale of these travel packages.

The second requirement, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. This requirement is satisfied where it is shown that the predicate acts are a regular way of conducting the defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise". *H.J. Inc., supra.* This is the exact scenario in our case. The telephone calls and mailings made by BEST RATE were this entity's regular way of doing business. In fact it was the only way they conducted their business. Because of this fact, BEST RATE could have continued to conduct its business in this manner indefinitely. The only reason it did not, was because BANCO decided to close the Merchant Service Account when it noticed an unusual amount of chargebacks in the account. Appellant's view that a pattern of racketeering was not shown because the travel agency was out of business is absurd. The court in *H.J. Inc., supra,* did not intend to allow enterprises that were involved in a pattern of racketeering to escape RICO just because the enterprise closed down after the period of time during which it committed the racketeering activity. It is evident from the facts presented at trial that a pattern of racketeering existed. It was this same pattern of racketeering that was the

proximate cause of the losses suffered by the bank.

As Judge Nickerson states in his memorandum and order dated February 21, 1990: " . . . Defendant, or she and her co-defendants, met the definition of an 'enterprise'. She engaged in activities which affected interstate commerce and participated in the conduct of the enterprises' affairs through a 'pattern of racketeering activity' as the Second Circuit has construed 18 U.S.C., Section 1961(5) ." *See also H.J. Inc., supra,* and ***Beauford, supra.*** Judge Nickerson's decision further states that:. " . . . By causing hundreds of fraudulent mailings and telephone calls to be made in 1987, defendant violated the mail fraud statute 18 U.S.C. Section 1341, as well as the wire fraud statute, 18 U.S.C. Section 1343."

An additional issue which the Petitioner addresses in her brief is her assertion that "the bank and its lawyers deliberately misled the Court by claiming that telemarketing was prohibited." The Petitioner misinterprets the testimony of MAISONET and DOMINGUEZ. It is not telemarketing *per se* that is prohibited by the Agreement. It is telemarketing consisting of fraudulent solicitations which were prohibited. These actions directly violated paragraph 10 of the Member Agreement.

On January 1, 1987, NEGRON executed a Master Charge/Visa Member Agreement (the "Agreement") with BANCO (A34). From that date on NEGRON continuously breached said Agreement.

The terms at issue of the subject Agreement are as follows:

> "10. Member warrants, represents and covenants with respect to each sales slip delivered to Bank as follows: that the slip arose from a bona fide and legal sale in the ordinary course of business

> in which Member gave value; that no defense, offset, counterclaim or dispute exists or shall arise as to such transaction; . . . that Member shall indemnify and hold Bank harmless from any and all claims by a Cardholder arising from the sale imposed by way of defense, set-off or counterclaim; . . . If Bank determines that Member has breached any warranty or agreement hereunder, . . . Member shall repurchase upon Bank's demand such sales slip and Bank may thereupon charge Member's account for the amount credited to Member with respect to such sales slip (and in the event of any deficiency in Member's checking account, Member shall pay to Bank the amount thereof) . . . "

The testimony at trial showed that NEGRON created charge slips against the credit cards of persons called through the use of telephone solicitations. Contrary to the terms of the Agreement, the charge slips did not arise from a bona fide and legal sale in the ordinary course of business. As stated in the arguments above, these telephone sales were fraudulent for a variety of reasons. Misrepresentations were made as to the quality of the merchandise being sold and the services to be performed. In addition there was unauthorized use of card numbers (A100-A103 and A130-A132).

NEGRON further violated the Member Agreement by failing to repay BANCO for the chargebacks created because of the disputes as to the transactions with the cardholders. At no time has she ever repaid the losses caused to BANCO by these chargebacks (A60-A62, A134-A136).

II.

THE DECISION MADE BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AND AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO RELIEVE THE ATTORNEY FOR GARIE NEGRON FROM REPRESENTING HER WAS CORRECT.

In August, 1988, GINO JOSH SINGER, ESQ., ("SINGER") as attorney for NEGRON, made a motion seeking to be relieved as counsel in the case and asking the United States District Court for the Eastern District of New York to appoint counsel for NEGRON from the Court's *pro-bono* panel. That part of the motion seeking relief as counsel was granted, but the appointment of counsel from the Court's *pro-bono* panel was denied by Judge Nickerson's memorandum and order dated December 6, 1988 (A40, A41; SA58-SA65). It is worth noting that Judge Nickerson's decision was not challenged until NEGRON'S appeal to the United States Court of Appeals for the Second Circuit more than a year and a half later.

Respondent has argued that petitioner's belated challenge of that decision was solely directed to divert the Court's attention from the real issue of the appeal, her racketeering conduct. Such characterization stems from the baseless nature of Petitioner's contentions and the fact that she hid from the Court essential information which clearly demonstrated the fallacy of her challenge. Petitioner still does not show this Court that the decision to relieve counsel was in error.

Petitioner attacks SINGER's affidavit terming the arguments set forth therein as conclusory. Petitioner knows they were not such, but that they fully depicted the reality not only that Petitioner was unable or unwilling to pay her attorney, but also that Petitioner disagreed with him as to the legal strategy to follow in defending her case. Petitioner herself alludes to both aspects

of her differences with counsel in a letter dated August 7, 1988, addressed to Magistrate Amon, which appellant conveniently left out of Appellant's Appendix (SA66-SA68) in her appeal to the United States Court of Appeals for the Second Circuit.

The letter above mentioned was specifically cited by Judge Nickerson in his memorandum of December 6, 1988. Contrary to what Petitioner would have this Court believe, Judge Nickerson did give careful consideration to SINGER's request and based his decision on the facts presented before him. Petitioner never controverted SINGER's allegations or, as Judge Nickerson said: " . . . made the Court aware of any reason why Mr. Singer's withdrawal impermissibly prejudiced her". In fact, on the date the motion to relieve counsel from representing NEGRON was called on the calendar, September 7, 1988, NEGRON failed to appear before the Court (SA; Docket Sheet, page C).

Judge Nickerson's decision was rendered on December 6, 1988 and the trial in this case was held on October 26, 1989. During the ten month period between the decision and the trial NEGRON had ample opportunity to hire another attorney, and she did so, although she chose not to disclose this fact to the United States Circuit Court. At a status conference held in June, 1989, NEGRON was notified that the trial was being scheduled for October 10, 1989. As the trial date was approaching, in the beginning of September, 1989, Respondent's attorneys were contacted by two different lawyers who said to represent NEGRON attempting to settle the case [see letters to Edward Grossman, Esq., and Jose Rey, Esq. (SA69-SA70)]. This information is not disclosed anywhere in Petitioner's papers. Apparently, NEGRON disagreed again with the advice of the two new attorneys, thought that the settlement terms were not favorable to her, and decided to take upon herself a *pro se* defense at trial.

NEGRON was not left helpless by Judge Nickerson to face

the trial. For whatever reason, she never asked to proceed as a poor person under 28 U.S.C. Section 1915, perhaps deciding against such option to avoid full disclosure of her assets or income. As far as Respondent knows, NEGRON is the owner of two real estate properties, which, though attached by the Court, could have served as collateral to any fee arrangement with an attorney to obtain legal representation. What happened here, however, was that NEGRON would not agree to any fee arrangement other than, perhaps, on a contingency basis. Given the facts of this case, it is understandable why such proposal would not be acceptable by most attorneys.

Respondent respectfully submits to this Court that NEGRON made a conscious and informed decision not to hire an attorney to represent her at trial. Although her motives are not at all clear and leave room for speculation, NEGRON's pattern of conduct in her dealings with counsel warrant the assumption that she thought herself more capable to defend her own interests than the attorneys that represented her and preferred to appear at trial *pro se.*

The case cited by Petitioner's brief concerning this issue is not on point. Respondent would not have even addressed the inclusion of such case, had this appeal been the work of a *pro se* litigant. It is too apparent, however, that the appeal was put together by an attorney, not by NEGRON herself. As she did in the trial and at the Circuit Court level, NEGRON is now before this Court playing again the part of a helpless innocent litigant to gain the sympathy of this Court. The facts of this case, however, speak for themselves, and show that this petition is totally baseless.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Petitioner has not complied with the basic requirements of U.S. Sup. Ct. Rule 10, 28 U.S.C.A., in that Petitioner has failed to advance any special or important reason for the review sought. Petitioner has neither brought to the attention of this Court conflictive United States Court of Appeals decisions on the matter at hand, nor has she shown that the appellate decision being challenged, or the decision of the lower court, so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The two reasons on which Petitioner bases her request are so unfounded that her petition should be rejected at once for lack of merit. As the first reason, Petitioner would have this Court grant the writ to prohibit the use of the RICO statute in purely civil matters. The applicability of the RICO statute to civil cases has been determined by this Court in *Sedima, supra,* and *H.J. Inc., supra.*

In *Sedima, supra,* this Court considered for the first time the civil action provisions of RICO reversing a decision of the United States Court of Appeals for the Second Circuit which held that a civil action could not be maintained unless the defendant had already been convicted of a predicate act or of a RICO violation. This Court stated that a prior conviction requirement is not supported by RICO's history, its language, or considerations of policy. It observed that RICO is to be read broadly taking into account not only Congress' self consciously expansive language and overall approach, *see United States v. Turkette,* 452 U.S. 576, 586-87, 101 S. Ct. 2524, 2530-31, 69 L Ed. 2d 246 (1981) but also Congress' express belief that RICO is to be liberally construed to effectuate its remedial purposes. *See also Indelicato* and *Beauford, supra.*

This Court in *Sedima, supra,* held that a civil RICO plaintiff must show the defendant's (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, and that the statute requires no more than this. The Petitioner in her reasons in support of certiorari states that the damages of the bank were self created by crediting Visa-Mastercard customers, solely for goodwill, thereby causing an overdraft of Petitioner's account at BANCO, and not the proximate cause of any racketeering act. Respondent's arguments above set forth the true facts of this case and clearly demonstrate that all requirements of a civil RICO action have been met.

H.J. Inc., supra, is a very recent case decided by this Court which further indicates the Court's position as to the use of the RICO statute in civil matters. This Court stated that neither RICO's language nor its legislative history supports a rule that a defendant's racketeering activities form a pattern only if they are characteristics of organized crime. No such restriction appears in RICO's text. RICO clearly reaches civil as well as criminal defendants. It is unnecessary for this Court to review this issue.

The second reason advanced by Petitioner for a writ of certiorari is that this Court should consider whether a Federal Court may relieve counsel for a party, without the party's consent. This question has been addressed and decided by various United States District Courts and United States Court of Appeal cases. In his memorandum of December 6, 1988, Judge Nickerson cites as authority the case of *Statute of Liberty - Ellis Island Found. v. International United Indus., Inc.,* 110 F.R.D. 395, 397 (S.D.N.Y. 1986). In said case a law firm was allowed to be relieved as counsel based on allegations that his client had not cooperated with the firm and had not paid for services. The case was never appealed.

The grant or denial of any attorney's motion to withdraw

in a civil case is a matter addressed to the discretion of the trial court and will be reversed on appeal only when the trial court has abused its discretion. *Moore v. Sunbeam Corp.*, 459 F.2d 811, 829 (7th Cir. 1972). An abuse of discretion is established only where no reasonable man could agree with the district court; if reasonable men could differ as to the propriety of the court's action, no abuse of discretion is shown. *Smith v. Widman Trucking & Excavating,* 627 F.2d 792, 795-96 (7th Cir. 1980); *see also Beshear v. Weinzapfel,* 474 F.2d 127, 134 (7th Cir. 1973).

In the case at hand, Judge Nickerson did not abuse his discretion in relieving SINGER as counsel for NEGRON. As stated above in Respondent's argument, Judge Nickerson gave very careful consideration to SINGER'S request and based his decision on the facts presented before him. (See Argument II herein). In reference to Petitioner's lack of opposition to SINGER's motion to be relieved as counsel, *see Ma v. Community Bank,* 494 F. Supp. 252, 260 (E.D. Wis. 1980).

The case law on whether a Federal Court may compel a party, such as Petitioner, to proceed to trial without counsel is well settled. Motions for appointment of counsel in civil cases are addressed to the sound discretion of the trial court and are granted only in exceptional circumstances. When a claim of poverty is made, it is proper and indeed essential for supporting affidavits to state facts as to affiant's poverty with some particularity, definiteness and certainty. *United States v. McQuade,* 579 F.2d 1180, 1181 (9th Cir. 1978) and *Jefferson v. United States,* 277 F.2d 723, 725 (9th Cir. 1960). In this case NEGRON never asked to proceed as a poor person under 28 U.S.C. Section 1915, perhaps deciding against such option to avoid full disclosure of her assets and income. This Court has previously decided that a person who can afford to retain counsel has no constitutional right to have counsel appointed. *United States v. Calandra,* 414 U.S. 338, 353, 94 S. Ct. 613, 622, 38 L. Ed 2d 561 (1974).

CONCLUSION

Petitioner has failed to advance any reason why this Court should grant certiorari. Her petition should be denied. If said petition is granted then we ask this Court to affirm the decision of the United States District Court for the Eastern District of New York, which was thereafter affirmed by the United States Court of Appeals for the Second Circuit. The decision to relieve the attorney for Petitioner NEGRON was correct and sufficient evidence was presented that Petitioner NEGRON committed fraud in her telemarketing activities through a RICO enterprise, which activities were the proximate cause of the bank's losses.

Dated: New York, New York
January 10, 1991

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